IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 941 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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RAMAJI THAVRAJI

Versus

STATE OF GUJARAT

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Appearance:
1. Criminal Appeal No. 941 of 1996
MRS SHILPA J UNWALLA for Appellant
MR S S Patel, APP for Respondent

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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 16/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.P.BUCH)

Present appeal under section 374(2) of Criminal Procedure Code, 1973 (for short, 'the Code') has been

preferred by the appellant abovenamed, challenging the judgment and conviction order dated 31.8.1996 recorded by the learned Addl.Sessions Judge, Sabarkantha at Himatnagar in Sessions Case No.82/94 convicting the present appellant for offence punishable under sections 302 and 324 IPC and sentencing him to suffer R.I. for life and directing him to pay fine of Rs.500/-. In default, R.I. for six months for an offence punishable under section 302 IPC and R.I. for six months and a fine of Rs.100/- for an offence punishable under section 324 IPC. The trial court directed that both the substantive sentences to run concurrently. At the same time, the appellant was acquitted of an offence punishable under section 323 IPC and under section 135 of Bombay Police Act.

2. The prosecution case against the present appellant may be briefly stated as follows:

Appellant had some dispute regarding land with the deceased. Therefore, according to the case of the prosecution, on 22.3.1994 at about 11.30 a.m. when the deceased was reparing his hedge at village Dhuleta and when his daughter, informant-Savitaben was grazing her goats in the same field, the appellant arrived at the spot. Then, according to the case of the informant-daughter, a pickaxe was lying near the deceased. The appellant picked up the pickaxe, heat it on fire and place the said heated pickaxe on various parts of the body of the deceased. The deceased shouted at which the daughter went to the place where the deceased was lying at that point of time. The appellant, on seeing the daughter coming to that place, ran away from the said place. Daughter-Savitaben saw the deceased lying on the ground. The deceased had several injuries including burn injuries on his person. Savitaben called her mother Laxmiben who was also staying in a hut in the same field. Other persons were also called. Her brothers were away from the village. Therefore, message was sent to one of them and the daughter herself went to village Palla to inform another brother who was working there. Thereafter, it seems, the daughter went to outpost to file FIR at village Palla. She noted that no police personnel was present there. Therefore, she went to village Shamalaji and filed FIR at the said police station.

3. It is also the case of the prosecution that the incident actually took place in the field of one Manji Kalaji who happens to be uncle of the appellant. The prosecution has also come out with a case that even

Manji Kala had also come to the spot on hearing shouts of the deceased. Manji Kala has been cited as an eye witness by the prosecution.

4. When the FIR was filed, the concerned Head Constable came to the spot and he had drawn inquest panchnama in respect of the dead body of the deceased. Thereafter, he entrusted the investigation to the Police Sub-Inspector. The Police Sub-Inspector in-charge of the investigation visited the place. He had drawn panchnama of the scene of offence and muddamal articles were seized from the said place. They included slipper, hand kerchief, axe, pickaxe etc. All these muddamal articles were seized in presence of panch witnesses. Statements of witnesses were recorded, muddamal articles were sent for examination and opinion to the Forensic Science Laboratory. Dead body of the deceased was sent to the hospital for post mortem examination. Dr.Pravinchandra Sheth had carried out post mortem examination and sent the post mortem report to the police investigating officer. Thereafter, the investigation was undertaken in order to arrest the present appellant. Efforts were made and ultimately the appellant was arrested. In the meantime, investigation was also undertaken in order to ascertain as to whether the appellant was attending the place of his duty where he was working. Relevant record was also obtained from the said employer in order to ascertain if the appellant was attending to his duty. On completion of investigation, charge sheet was filed in the court of learned Judicial Magistrate First Class, Himatnagar, where the case was registered as criminal case No.469/94. Charge sheet was filed for offence punishable under sections 302 and 324 IPC and for other offences. As offence under section 302 IPC is exclusively triable by a Court of Sessions, the case against the appellant was committed to the Court of Sessions. There it was registered as Sessions Case No. 82/94.

5. Learned Addl.Sessions Judge, in-charge of the said Sessions Case, framed charge at Exh.8. It was read over and explained to the appellant. The appellant pleaded not guilty to the said charge and, therefore, the learned Addl.Sessions Judge proceeded to record evidence against the appellant. During the course of recording of evidence, the prosecution has produced following oral evidence before the trial court.

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PW 1 Savitaben Badaji, d/o decd.and informant Exh.12
PW 2 Manji Kala, eye witness & uncle of

the appellant Exh.14
PW 3 Jitendrakumar M Modi, officer of the employer of the appellant Exh.15
PW 4 Manji Dhulabhai, panch witness Exh.23
PW 5 Galbaji Hiraji, Head Constable, who registered the FIR of Savitaben Exh.25
PW 6 Dr.Pravinchandra Jayachand das, M.O. who performed the post mortem examination Exh.33
PW 7 Kantiji Navaji, Head Constable & I.O. Exh.38
PW 8 Ramsingh Gopalsingh Chawla, PSI,I.O. Exh.39

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6. The prosecution has also produced certain documentary evidence before the trial court such as FIR of Savitaben Exh.13, records of the employer of the appellant at Exh.16, inquest panchnama Exh.17, panchnama about recovery of the clothes of the deceased Exh.18, panchnama regarding search of the house of the appellant Exh.19, arrest panchnama Exh.20, panchnama regarding recovery of the clothes of the appellant Exh.21, death certificate of Laxmiben, wife of the deceased who died pending trial - mark 22/1, panchnama regarding scene of offence Exh.24, map/Sketch of the place of offence Exh.27, post mortem report, exh.35, communication sent to FSL Exh.40 , FSL report Exh.41, sketch of scene of offence Exh.42 etc.

7. On conclusion of the evidence, the learned trial Judge recorded further statement of the appellant as required under section 313 of the Code of Criminal Procedure. The learned trial Judge afforded opportunity to the appellant to explain the circumstances appearing in evidence against the appellant. There the appellant has come out with a case of denial stating that he has not committed any offence and he was falsely involved in the said offence. However, the appellant has not examined any witness. The trial court found that the case against the appellant was duly proved. That the two eye witnesses had given a correct version of the incident and therefore, the evidence was acceptable. The trial court also found that the oral evidence of the two eye witnesses was corroborated by circumstantial evidence as well as by medical evidence. Therefore, the trial court found the evidence on record to be acceptable. On the strength of the findings on the evidence on record, the trial court found that the appellant was proved to have committed intentional murder of the deceased and also voluntarily caused injury to the deceased by means of a deadly weapon. On the strength of the aforesaid set of findings, the learned trial Judge convicted the appellant for offence punishable under section 302 and 324 IPC and

sentenced him as aforesaid.

8. Feeling aggrieved by the aforesaid judgment and conviction order of the trial court, the appellant has preferred this appeal before this Court. It has been mainly argued here that the two eye witnesses relied upon by the trial court were not reliable eye witnesses and, therefore, he has committed serious error in accepting them as true and genuine eye witnesses. It has also been contended that the genuineness of the evidence of the eye witnesses has not been properly appreciated and it is not possible that the deceased would receive 33 injuries on his person and till then nobody had reached there. It has further been contended that even though it is a case in evidence of the prosecution that the appellant had branded with pickaxe on different parts of the person of the deceased and though the deceased had put on a jersey with sleeves, no black mark or burn mark was found on the clothes of the deceased which would seriously doubt the genuineness of the case of the prosecution. It has also been contended that there were other witnesses who have not been examined by the prosecution. It is further contended that it is not probable that one person would go on heating the pickaxe very frequently and then would go on placing it on different parts of the body of the deceased and then that would result injury marks which are 33 in number. That if the appellant intended to cause death of the deceased, he would have hit the deceased by means of pickaxe. It is also in evidence that along with the pickaxe, an axe was also lying by the side of the deceased at the time of the offence and therefore, it has been contended that the appellant could have used the said axe for killing the deceased if at all he wanted to kill him. It has also been contended that Manji Kala has been cited as an eye witness but his name has neither been conveyed to the police in FIR nor in oral testimony of the informant in the trial court it has been mentioned. Therefore, the presence of Manji Kala is doubtful. Even the conduct of the daughter of the deceased is doubtful and the delay in filing FIR would also show that there was some concoction in the factual aspects of the case with a view to falsely implicate the present appellant in commission of a serious offence of murder. It has also been contended that if the deceased had a land dispute with the appellant and same way he had some dispute with Manji Kala and, therefore, the appellant has been wrongly involved in the present offence. It has, therefore, been contended that these aspects have not been properly appreciated by the trial court. That therefore, the judgment and conviction order are illegal and deserve to be set aside.

9. The appellant has, therefore, claimed that the present appeal be allowed, the judgment and conviction order recorded by the trial court be set aside, the appellant may be acquitted of the offence punishable under section 302 and 324 IPC and he may be set at liberty forthwith. In the alternative, it has been claimed that the prosecution has suppressed genesis of the entire episode and looking to the conduct of the witness and looking to the nature of the injury sustained and looking to the other circumstances, at least it may be held that the prosecution has not proved its case against the appellant beyond reasonable doubt and, therefore, benefit of doubt may be extended to the appellant.

10. On receiving the appeal, it was admitted. However, the prayer for bail was rejected. At the final hearing, the matter has been extensively argued on behalf of the appellant by learned Advocate Mrs. Shilpa Unwala. On the other hand, Mr S S Patel, learned APP has supported the judgment.

11. As said above, the case of the prosecution before the trial court was that there was some land dispute between the deceased and the appellant and on account of the said dispute, the appellant caused severe injuries to the deceased by branding with pickaxe and as a result of which the deceased died. The prosecution has examined Dr.Pravinchandra Sheth at Exh.30 who has produced and proved post mortem note at Exh.35. Evidence of the Medical Officer and the post mortem note clearly shows that the deceased died on account of shock produced by stoppage of heart and due to blows on chest and burns on body.

12. The above evidence clearly indicates that the deceased died a homicidal death. Even before the trial court, the fact that the deceased died a homicidal death was not seriously disputed. Same way, before this Court also this issue has not been seriously disputed though an attempt was made to show that the deceased died a natural death on account of heart attack. But in view of the evidence on record, it is not possible to accept the same. Therefore, the trial court has also observed that the deceased died a homicidal death. Even this court also finds the said findings of the trial court does not appear to be incorrect and therefore, the said finding is required to be confirmed.

13. The next question will be as to whether the said

injuries were really caused to the deceased by the present appellant. In this connection, the prosecution has examined two witnesses. First is Savitaben, PW 1 Exh.12. She is the daughter of the deceased. She was staying with the deceased, two brothers and mother. Their house was situated in the field where the offence is said to have been committed. She has deposed before the trial court that she was grazing her goats in her field and the deceased was repairing hedge on the boundary line of the field. She has further deposed that when the deceased was repairing the hedge, the appellant was found branding the deceased with pickaxe. She has also deposed that the appellant heated the pickaxe and placed it on the head of the deceased also. That similarly, the deceased was also branded by the appellant by means of heated pickaxe on his hand, chest, left leg, right leg as well as on his abdomen. She has further deposed that the deceased raised shouts and therefore, she rushed to him and when she reached the spot, the deceased was lying on the ground and the appellant had run away from the said place.

14. Almost similar evidence has been given by another eyewitness Manji Kalaji, PW 2 at Exh.14. He has also stated that when he was at his house in his field adjoining to the field in which the incident took place, he heard shouts from the direction of the house of the deceased. Therefore, he came out of the house and saw that the appellant was branding the deceased by means of pickaxe. He has further deposed that the deceased was killed by the appellant and PW 1 Savitaben had arrived there. She has further stated that even Laxmiben, widow of the deceased had also arrived there.

15. Incidently, it may be stated that Laxmiben was wife of the deceased. She was shown as eye witness. However, before the commencement of trial, she died and, therefore, she naturally could not be examined as a prosecution witness. The record shows that death certificate of the deceased has also been produced on record by the prosecution for confirmation and information.

16. Any way, these are the two eye witness who have been brought to the Court by prosecution with a view to prove that the deceased was branded with pickaxe by the appellant and, therefore, the present appellant had caused death of the deceased.

17. Now, it is required to be considered that so far as PW 2, Manjibhai the appellant is concerned, his name

has not been mentioned in the FIR as argued by the learned Advocate for the appellant. The FIR has been produced at exh.13 and it has been proved through oral evidence of the informant herself. On going through the FIR it becomes clear that though the names of other persons have been indicated in the FIR, the name of the aforesaid eye witness is significantly absent in the aforesaid FIR. The informant does not clarify as to why the name of the said eye witness has not been mentioned in the FIR.

18. Another aspect of the case is that the informant has tendered evidence before the trial court as PW 1 at Exh.12. There also she has not disclosed presence of Manji Kala as eye witness. It is required to be considered that the name of the said witness has not been mentioned at all by this witness as eye witness during the course of her lengthy cross-examination. On the one hand, name of the said witness has not been shown by the informant as eye witness during the course of evidence, on the other hand, she has also not stated that the said witness had come to the spot soon after the incident was over.

19. It may happen that a rustic village girl of 22 years of age may not disclose names of all the witness when FIR is filed. It is more so, when she filed the FIR after seeing her father being killed. On the other hand, the evidence was recorded about 2 years after the incident had happened. At least at that point of time she was mentally steady and, yet, she was not in a position to give full account of the incident which took place in her presence. Even her evidence shows absence of the name of the said witness as an eye witness or as a witness who had arrived at the spot after the death of the deceased. This shows that reasonable doubt has been created on the point as to whether Manji Kala was really an eye witness to the incident.

20. If we turn to the evidence of Manji Exh.14, then also we find that he has clearly deposed that when he came out of his house on hearing the shouts of the deceased, he noticed that the appellant was giving pickaxe blow, on the person of the deceased. In order to appreciate the evidence of this witness, it would be appropriate to refer to the medical evidence on the subject. The prosecution has examined Dr.Pravinchandra Sheth, PW 6 Exh.33. According to the evidence of this medical expert, he had noticed not less than 33 injuries on the person of the deceased when he had undertaken the post mortem examination of the deceased. It is required

to be considered that according to the evidence of this witness, all the injuries were superfluous and there was no internal injury noticed by him when internal examination of the dead body of the deceased was undertaken.

21. If the deceased was really hit by means of pickaxe, then naturally there would be injuries on the person of the deceased and these injuries would penetrate the skin of the deceased also. However, the evidence of medical expert is very clear and there it has been clearly mentioned that there was no internal injury noticed when the internal examination was undertaken. This clearly indicates that the injuries sustained by the deceased could not have been caused as a result of blows being dealt at him particularly when the allegation in the evidence is that the deceased was hit by means of pickaxe.

22. It is not much in dispute that a pickaxe is an iron instrument. It is heavy in weight and when blow is dealt by means of pickaxe, then naturally there would be injuries penetrating the skin of the deceased. In the present case, we find that the injuries were superfluous and the injuries were on the surface of the body of the deceased and they had not penetrated the skin of the deceased. This would clearly indicate that the deceased could not have been hit by the appellant or by someone else by means of a pickaxe which is an iron instrument. In other words, the evidence of Manji Kala at Exh.14 becomes doubtful when he says that the deceased was found hit by the appellant by means of iron pickaxe.

23. Another aspect of the case is that though Manji Kala Exh.14 has deposed before the trial court that the deceased had burn injuries on his person, the evidence of this witness does not disclose that he had seen the appellant heating pickaxe and then causing injuries to the deceased by means of the said heated pickaxe.

24. On the other hand, the informant has deposed before the trial court that the appellant was seen placing the pickaxe on fire and then placing the same on different parts of the body of the deceased. On the one hand, the informant says like this, on the other hand, another eye witness Manji Kala Exh.14 does not say so. It is true that there were burn injuries on the person of the deceased when examined by the Medical Officer referred to hereinabove. However, the fact that the heated pickaxe was placed on different parts of the body of the deceased was stated in evidence by the informant

and the said fact was totally absent in the evidence of Manji Kala Exh.14. Therefore, there is material contradiction between the evidence of two eye witnesses with respect to material particulars which goes to the root of the case of the prosecution. The aforesaid contradiction has not been explained by the prosecution. Even during the course of judgment, the said contradiction has been properly dealt with by the trial court. Even before this court, the learned APP supporting the judgment of the trial court, has not been able to explain the said contradiction appearing in evidence between the eye witnesses.

25. In the present case, we find only two eye witnesses are there to depose before the trial court. There is no other eye witness who had given evidence before the trial court. Therefore, when there were only two eye witnesses before the trial court and when there are material contradictions on material particulars, then it would be difficult to accept the evidence of either of the two.

In that view of the matter, it would be necessary to seek corroboration to the testimonies of the aforesaid two witnesses. This court is aware of the fact that when eye witnesses have tendered evidence and even if they are closely related to the deceased, it would not be necessary to reject their testimonies on the ground that the witnesses were related to the deceased.

26. At the same time, when it is found that there are contradictions on material particulars between the evidence of two eye witnesses and when there is no other eye witness available to the prosecution, then in that case, it would be necessary to seek some corroboration to the testimonies of these two witnesses.

27. Now, so far as the evidence of Manji Kala is concerned, his evidence as referred to hereinabove, has been contradicted by the medical evidence. It is more so, when it is not even the case of the informant that the deceased was hit by pickaxe by the appellant. Therefore, on the one hand, the evidence of Manji Kala Exh.14 does not get corroboration from the evidence of the informant, on the other hand, his evidence stands contradicted by the medical evidence referred to hereinabove. This would show that the evidence of Manji Kala Exh.14 is doubtful and, therefore, even his presence at the time and place of the incident would also not be free from doubt.

28. It is required to be considered that the defence has suggested that Manji Kala was not on good terms with the appellant. The witness has not accepted the said suggestion and though there is no other material on record to show that the deceased had some enmity with the witness, it is also required to be considered that the witness is the uncle of the appellant and yet he has come out to give evidence against his nephew. This is not a trifle matter in which the persons may be convicted to suffer imprisonment for few days or months. The witness, who is the uncle of the appellant, has come forward to give evidence against his nephew that too in such a serious offence, may lead to sentence of hanging or imprisonment for life.

29. Apart from the contradictory versions of this witness, again some doubt has been raised in his testimony and looking to the aforesaid background it may be that the appellant may have some dispute and therefore, the witness have come out to give evidence against the present appellant. This probability cannot be ruled out in the aforesaid background.

30. It is then required to be considered that at one stage, Manji Kala has deposed that when he heard the shouts of the deceased and when he came out of his residence, he had seen the appellant giving blows to the deceased by means of pickaxe. At that point of time, he did not go to the spot. He himself has deposed in examination-in-chief that he had not gone to the spot at that point of time. It is true that every person may have different reaction in different set of facts and circumstances. In the present case, we find that the appellant was the nephew of the witness. He had seen his neighbouring land owner, the deceased, being hit by the appellant, by means of pickaxe. He saw other persons arriving on the spot Savitaben and Laxmiben, the widow of the deceased. And yet he did not go to the spot. His residence is not far away from the place of the incident. The said conduct on the part of the appellant also raises doubt on the point as to whether he was really an eye witness to the incident.

31. It is required to be considered that the witness has deposed that thereafter, Soma and Valji Rama had arrived at the spot and thereafter, he went to the said place. Now if he had not gone to the place of the incident at first instance, he had no reason to go to the said place at a later stage. This conduct on his part also shows some doubt in his evidence. It is required to be considered that the panchnama of the scene of offence

was drawn by the Investigating Officer. In the said panchnama, field of the witness and his house have also been shown. It is proved that the field of the witness and the field of the deceased are adjoining to one another. Therefore, they are neighbours and there cannot be any dispute about it. However, it is required to be considered here that the panchnama shows that the house of the witness is shown in it as an unused house. This clearly shows that the house of the witness was not put to use. When the house of the witness was not in use, then it has not been explained or understood as to how the witness should be present in the house which was not be used by him as stated in the panchnama. The prosecution has not explained this position at any point of time. It is also required to be considered that when it has been mentioned in the panchnama that the said house was an unused one, then in that event, it would not be open now to the prosecution to say that the said averment is not a factual and correct statement made in the panchnama. In that view of the matter, again from this angle, the presence of the witness at the place and time of the offence becomes doubtful. If the said house has not been used and if the presence of the witness in the said house is not natural, then in that case, presence of the witness at the time and place of the offence also becomes doubtful.

32. Then, we can also turn again to the medical expert's evidence. Dr.Sheth at Exh.33 has been examined as prosecution witness to prove the post mortem examination report in respect of the dead body of the deceased Exh.35. Considering the evidence of Dr. Pravinchandra Sheth and the post mortem examination at Exh.35, there is no question of doubt that the deceased had sustained as many as 33 injuries on his person. Out of those 33 injuries, there are about 10 to 12 burn injuries on different parts of the body of the deceased. All the injuries were superfluous and none of them had penetrated the skin of the deceased. Here, it is required to be considered that if the appellant really intended to cause the death of the deceased, then he had at least two options with him. The deceased was having an axe with him for repairing hedge. The axe was found by the Investigating Police Officer when he had arrived on the spot. Same way, pickaxe was also found there. Even according to the informant, these two weapons were there from the beginning. This clearly shows that the appellant did not bring any weapon in order to kill the deceased. On the contrary, the weapons were easily and readily available on hand to the deceased at the time when the incident allegedly took place. Despite the said

availability of the said two weapons, the appellant did not use them for heating and beating the deceased. A blow or two by means of these two weapons would have brought the end of the life of the deceased. Instead, according to the theory of the prosecution, the appellant branded the deceased by means of pickaxe, with the result that surface skin of the deceased was burnt without further penetration beyond the skin. This means that the person who had caused injuries on the person of the deceased was very much particular in his action. The pickaxe was placed on fire for being heated, in such a way that the temperature of the pickaxe may not be very high. Otherwise, the injuries caused by heated pickaxe would have penetrated the skin of the deceased. The assailant also took precaution to see that the heated pickaxe is not placed on the body of the deceased for a longer time. Otherwise, the heat would penetrate the skin of the deceased and there may not be any internal injury on the person of the deceased. These two precautions appear to have been taken by the assailant. Now if the appellant was very much angry with the deceased on account of the land dispute and also wanted to finish the deceased, he would not have acted in the aforesaid manner. The appellant was not expected to heat the pickaxe at a low temperature and was not further expected to place the heated pickaxe on the person of the deceased for a short while. The assailant was only interested in causing injuries on the person of the deceased without penetrating skin of the deceased. Considering the aforesaid aspects of the case, again the case of the prosecution becomes doubtful. even the genesis of the act becomes doubtful according to the opinion of this Court.

33. It is then required to be considered that the deceased had on his person, a jersey with full sleeves and dhoti when the incident took place. It is not much in dispute that during the course of the aforesaid episode, the petitioner has sustained many burn injuries on different parts of his body. Injury No.7 is found on the lower part of right hand. Injury No.8 again has been found on the lower part of the right hand. Injury No.5 has also been found on the posterior part of the right hand. Injury No.10 is found on the right side of the chest and injury no.11 is found on the upper part of the abdomen of the deceased. Injury no.12 is found on the lower part of the left hand. Injury no.13 is found on the left hand of the deceased. Injury no.14 is found on posterior part of the left hand of the deceased. Injury no.15 is found on right knee. Injury no.17 is found on the lower part of the right buttock. Injury No.18 is

found on the middle part of the right leg. Injury No.19 is found on the upper side of the left elbow. Injury No.20 is found on the left leg. Again, injury no.21 is found on his left leg. Injury no.28 is found on the back side of the posterior side of left hand. All these injuries were burn injuries.

34. Now, if the aforesaid injuries were caused to the deceased by the appellant, then it is a fact that the appellant had in his person a jersey with full sleeves. He also has a dhoti on his person. In that view of the matter, if the above injuries were caused on the aforesaid parts of the body of the deceased by the appellant, the heated pickaxe would first touch the clothes put on by the deceased. It is required to consider that if the heat of the heated pickaxe had penetrated the clothes put on by the deceased, they would have touched the skin of the deceased. If the heated pickaxe is placed on the clothes even for a short time, it would have left some black marks on the clothes themselves. However, here the clothes do not indicate any such black mark and even the evidence on record shows that there was no black mark on the aforesaid clothes of the deceased. In that view of the matter also, it would be difficult to accept the version of the informant that the appellant branded the deceased with heated pickaxe on different parts of the deceased's body and that had resulted in severe burn injuries on the person of the deceased.

35. Then we also find that there are other injuries showing bruises on several parts of the body of the deceased. These injuries could not be caused by pickaxe or by axe. The eye witnesses have not explained as to how these injuries were noticed on the person of the deceased. These are the injuries found on the left side of the face, right forehead, left forehead, chin and right side of the face, lower part of the right hand, posterior part of the right hand, the left side of the chest, right side of the abdomen, the left side of the abdomen, the upper part of the abdomen, the right side of the abdomen, the backside of the chest between two scapula, the right shoulder, the posterior part of the left hand etc. This shows that there were several injuries on the deceased noticed by the Medical Officer. Two eye witnesses have not explained the said injuries. Again, these injuries would naturally not have been caused by means of pickaxe or axe. Now pickaxe and axe were the weapons available on the spot. It is not the case of the two prosecution witnesses that the appellant had used some weapon other than pickaxe or axe. In that

view of the matter, when so many injuries were noticed by the Medical Officer on the deceased and when the said injuries have not been explained by the two eye witnesses, then also it becomes doubtful whether they were natural eye witnesses.

36. Again it is required to be considered, as stated above, that about 33 injuries were noticed on the person of the deceased by the Medical Officer. The informant was not near to the place in question. She was grazing goats in her field. If she had heard shouts and had rushed to the spot, it is difficult to accept that the deceased would be successful in causing 33 injuries including so many burn injuries on the person of the deceased during the said short span of a minute or two. It is not the case of the informant that even after the informant reached the spot, where her father was lying, the appellant continued his action of causing injuries to the deceased. Even Manji Kala also does not say that the deceased went on causing injuries to the deceased for a very long time. Even otherwise, it is not probable that the appellant would go on causing injuries even when his action has been noticed by the informant, Laxmiben and Manji Kala. Considering the aforesaid aspects of the case noticing 33 injuries on the person of the deceased, it is very difficult to accept that the appellant had caused those injuries on the person of the deceased in presence of at least three witnesses.

37. The informant has deposed before the trial court that after she had reached the spot and after the appellant had left the said place, she had called other witnesses. She has also stated that she had first gone to Village Palla for filing FIR and since nobody was available at Palla outpost, she had gone on foot to Shamalaji and filed FIR there. At the same time, it is required to be considered that she has deposed before the trial court in para 8 of her evidence that after the incident, Soma, Manji Kala and Valji Rama had arrived there and messages were sent to her brothers and there is no dispute that the deceased had two sons meaning thereby, the witness had two brothers at that point of time. It is not much in dispute that one of them had gone to village Palla and according to the case of the witnesses in FIR also, brother Madhubhai was called from Palla and another brother Singhabhai was called from another village. However, in para 6 of her evidence, the informant has deposed that when she had gone to call Madhubhai, Madhubhai met her on the way and she had told Madhubhai about the aforesaid incident. Thereafter she

and Madhubhai had gone to file FIR. She also stated that there was no one in the outpost and therefore, she had gone to Shamalaji for filing FIR. This shows that she had not waited for Madhubhai to come to village Dhuleta. Her evidence at para 6 further indicates that she had gone to village Palla to meet her brother Madhubhai but Madhubhai met her on his way, both of them had gone to village Palla. This would clearly show that there would be sometime lag for the witness to go to Palla. It is not her case that they had come back from village Palla. Palla is not situated at a distant place. At the best, one would take hardly one hour for reaching there. The incident had taken place in the early hours at 11.30 a.m. Therefore, soon after the incident was over different persons had gathered together. She proceeded to village Palla and met Madhubhai on the way and both of them had gone to Palla and since none was available there they had gone to Shamalaji which is at a distance of 7 kms. from Palla. In that view of the matter, it has to be accepted that the informant may not have been reached Shamalaji before late night hours. However, it is not much in dispute that the FIR in question was filed by the informant at about 11.30 p.m. though the incident took place at 11.30 a.m. and soon thereafter when the informant had proceeded to Palla and then she proceeded to Shamalaji which is again at a distance of 7 kms. from Palla. Then she would not take these many hours to reach Shamalaji police station for filing FIR at 11.30 p.m.

38. Delay in filing FIR may not be fatal in all cases. In some cases, delay may have been explained, in some cases, cause of delay can be inferred also. Therefore, delay in filing FIR may not be fatal in all cases.

39. In the present case, we find that when name of the eye witness is not shown as an eye witness in the FIR and when the informant has not referred Manji Kala as eye witness even in her oral evidence and yet Manji Kala has been posed as eye witness in the present case, then in that case, there are reasons to infer that during the time lag in between the happening of the incident and the filing of FIR, there would be some discussion amongst the persons gathered together there which may show that two witnesses may or may not have seem appellant as an assailant. It may be that there may be more than one persons on the spot. Some of them might have caught hold of the deceased and some might have caused the aforesaid burn injuries on the person of the deceased. It may be that the jersey with full sleeves and dhoti may have been

placed on the person of the deceased after the deceased sustained these injuries. Otherwise, presence of black marks on the said clothes could be seen. In other words, the incident as placed on paper through evidence of two eye witness, does not appear to be plausible or probable. As said above, the appellant had not seen heating pickaxe and placing it on the person of the deceased for a very short time. It was not necessary for him to heat it at low temperature, if he wanted to kill the deceased. The appellant is not found to be a neighbour of the deceased. His land is not shown to be adjoining the land of the deceased. Therefore, no boundary dispute could be there there between the two. It is nobody's case that there was dispute regarding right of way or right to take entry from one land to another. Therefore, when there is nothing on record as to the nature of the dispute and when they are not found to be persons sharing boundary, again it is doubtful whether there was really land dispute between the two. Therefore, again it would be difficult to accept that the appellant was really a person who is said to have caused the aforesaid injuries on the person of the deceased. Any way, the manner in which the incident is said to have taken place, it does not appear to be real and genuine one. It is not possible to accept that the deceased placed pickaxe on fire for a short time and then again place it on different parts of the body of the deceased. It is not acceptable that he went on heating the pickaxe on fire and he went on placing it on different parts of the body of the deceased. It is more so when black marks have not been noticed on the clothes of the deceased which were put on by him at the time when the incident is said to have taken place. In other words, the entire genesis of the episode is doubtful and it is not acceptable that the incident has taken place in the same manner in which it is said to be produced on record.

40. As said earlier, the appellant had at least two weapons at his disposal. Both were possessed by the deceased for repairing his hedge. One was an axe and another was pickaxe which is said to have been used by him. If the appellant, at all wanted to kill the deceased, two sharp edged weapons were available to him. Both were handy and both were lying on the ground by the side of the deceased. He could have killed him by means of either of the two weapons. A blow or two would have brought the life of the deceased to an end. It was not necessary for him to go on heating the pickaxe on the fire on so many occasions for very short time and then to place it again for a very short time on different parts

of the body of the deceased. This sort of action attributed to the appellant by the informant herself is not free from doubt. On the other hand, he took precaution to see that the pickaxe is not heated to a high temperature so as to penetrate the heat through the skin of the deceased. Same way, the appellant did not place the heated pickaxe on the person of the deceased for long time so that again the heat may not penetrate the skin of the deceased and therefore, the entire episode is said to have taken place is itself not free from doubt. Any way, the entire genesis itself is not free from doubt. The evidence of Manji Kala is not free from doubt and again the conduct of the informant is also not found free from doubt, it has to be accepted that the entire evidence led by the prosecution in general and the evidence of two so-called eye witnesses is not free from doubt and when the evidence of two witnesses in particular is not free from doubt and when there is no other evidence connecting the appellant with the crime, again it has become doubtful whether the appellant was really present on the spot and had really caused the aforesaid injuries to the deceased. The evidence of one doubtful witness cannot support the evidence of another doubtful witness. We cannot make total of evidence of such witnesses in order to convict an accused person.

41. To sum up, it is found by this court that the evidence of the only two eye witnesses is found to be doubtful and the presence and action of the appellant at the time and place of the incident is also found to be doubtful. Therefore, it is doubtful if the appellant really caused injury to the person of the deceased. When there is reasonable doubt developed from the evidence on record, then it is the duty of this Court to see that injustice is not caused to the appellant. In other words, the appellant should be extended benefit of the aforesaid reasonable doubt.

42. In that view of the matter, this court is of the opinion that the prosecution has not been able to prove genesis of the case of the prosecution. The prosecution has not been able to show beyond reasonable doubt that the appellant was present at the time when the incident took place. The prosecution has also not been able to prove beyond reasonable doubt that he caused the aforesaid injuries to the deceased. The prosecution has also not been able to show beyond any reasonable doubt that the informant and Manji Kala were really eye witnesses to the episode in question. Even it is not

clear as to whether the dead body of the deceased was found on the land of Manji Kala or whether it was found on the land of the deceased himself. The evidence of the Investigating Officer Exh.39 and rough sketch of the scene prepared by him (Exh.42), read together, show that the dead body of the deceased was found lying in the field of Manji Kala and not in the field of the deceased. Panch Manji Dhulaji Exh.23 supports the said version. This would go to show that the incident did not take place in the field of the deceased. In the light of the background of the aforesaid facts and circumstances of the case, the prosecution can be said to have not proved its case beyond reasonable doubt. Therefore, as said earlier, the appellant is entitled to benefit of reasonable doubt.

43. For the foregoing reasons, this appeal is allowed. The judgment and conviction order dated 31/8/1996 recorded by learned Addl.Sessions Judge, Sabarkantha at Himatnagar against appellant - Ramajibhai Thavraji Damor in Sessions Case No.82/94 are herebhy set aside. The appellant is given benefit of reasonable doubt and he is ordered to be acquitted of offence punishable under section 302 and 324 of IPC. He is directed to be set at liberty forthwith, if no longer required in any other case. Fine, if paid, shall be refunded to the appellant. Muddamal articles to be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

[J M Panchal, J.]

[D P Buch, J.]

msp